STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL STEPHEN IRISH,

Plaintiff-Appellant,

v

KEVIN BECK, KIMBERLY R. BOSMA, MICHAEL BOSMA, COLLEEN GARBER, MATT GARBER, CATHY ENGLE, MICHAEL ENGLE, JIM JAMES, SANDRA JAMES, TIMOTHY D. JAMES, MELINDA JAMES-NICKELS, MICHAEL A. NICKELS, FRED SAINTAMOUR, and LESLIE SAINTAMOUR,

Defendants-Appellees.

UNPUBLISHED
September 24, 2009

No. 287631
Barry Circuit Court
LC No. 08-000302-NZ

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants in this action alleging defamation, intentional infliction of emotional distress, and malicious prosecution. We affirm.

I

On October 31, 2007, a jury convicted plaintiff Michael Stephen Irish of disturbing the peace, MCL 750.170. The jury acquitted Irish of aggravated indecent exposure, MCL 750.335(a)(2)(B). The trial court sentenced Irish to 19 days in jail, 24 months' probation, and a fine of $500. This Court affirmed defendant's conviction and sentence. *People v Irish*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 2009 (Docket No. 282950). In upholding Irish's conviction, this Court stated in its opinion that Irish "admitted during testimony to the conduct underlying his [disturbing the peace] conviction. *Id.* at slip op p 2.

The record in the present case reveals that on June 6, 2007, Cathy Engle and Mike Engle each provided a written statement to the police regarding the June 1, 2007, incident. On June 5, 2007, a number of citizens of the Algonquin Lake community provided a written statement to the Barry County Sheriff, with a copy to the Michigan State Police and the Barry County Prosecuting Attorney, requesting increased public safety patrols in and around the Algonquin

Lake community to "help protect our families." from Irish's "reckless behavior." This statement indicated, "citizens have witnessed [Irish] demonstrating unsafe behavior while drinking and driving, drinking and boating, and lewd behavior through indecent exposure." The Algonquin Lake community residents named as defendants in this case signed this statement.

After his conviction and sentence, Irish filed the present action on May 30, 2008, raising a claim of defamation against Cathy Engle, Michael Engle, and the remaining defendants, as well as claims of intentional infliction of emotional distress and malicious prosecution against all defendants. After answering, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) on the ground that the claims had no legal or factual basis. Defendants also moved for sanctions for filing a frivolous lawsuit under MCL 600.2591(1) and (2). With regard to the defamation claim, defendants argued that defendants' statements to the police of Irish's criminal activities were both privileged and truthful. With regard to the malicious prosecution claim, defendants argued that it was the Barry County Prosecutor's Office, and not defendants, that commenced and pursued criminal charges against Irish. With regard to the intentional infliction of emotional distress claim, defendants argued that no reasonable mind could conclude that defendants acted extremely and outrageously in reporting Irish's activities to the police.

A hearing was held on defendants' motions on August 7, 2008. In response to defendants' arguments, Irish maintained that the privilege afforded statements to the police does not apply to false statements, and that a question of fact existed with regard to whether defendants' statements to the police were false.[1] In granting defendants' motion for summary disposition, the court opined:

> Well, I – as I've already expressed, I have a very great difficulty believing that in this scenario that a person can be charged with two offenses, one being drunk and disorderly and the other one being aggravated indecent exposure, be acquitted on one count, convicted on the other after, quite frankly, engaging in extreme and outrageous conduct themselves; that is, the Plaintiff in this case, and the – and then turn around and sue the people who reported him to the police. That's just – I mean I've read the cases, I've read your briefs. I don't really need to read a brief to know that shouldn't be the law in the State of Michigan. And if it is, there is something very wrong with our public policy.

II

Plaintiff argues that the trial court erred by granting summary disposition of plaintiff's defamation claims. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Michigan Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit*, 194 Mich App 668,

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[1] It appears that Irish must be referring only to the statements regarding indecent exposure in light of the fact that Irish was acquitted on this charge only.

673; 487 NW2d 517 (1992). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Feister v Bosack*, 198 Mich App 19, 22; 497 NW2d 522 (1993).

To establish a defamation claim, a plaintiff must show (1) a false and defamatory statement about the plaintiff,[2] (2) an unprivileged publication to another party, (3) fault amounting at a minimum to negligence on the publisher's part, and (4) either actionability of the statement regardless of special harm or the existence of special harm as a result of the publication. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999). The complained-of statements must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53-54, 56-57; 495 NW2d 392 (1992).

Defendants Engle made the statements regarding defendant's alleged indecent exposure to the police, and the statement signed by all of the defendants was made to the police and the prosecutor. Where an absolute privilege exists, there can be no action for defamation. *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). In *Couch*, the defendant, a corrections officer, filed a prison "major misconduct report" against the plaintiffs, inmates in the custody of the Department of Corrections, charging them with sexual misconduct. A prison disciplinary hearing was held, and the plaintiffs were found guilty of the charge. *Id.* Before the disciplinary hearing, the plaintiffs filed an action against the defendant, alleging that he had defamed them by filing the report. *Id.* The trial court granted the defendant's motion for summary disposition on the basis that a prison disciplinary hearing was a "judicial proceeding" in which witnesses enjoy absolute immunity from liability for defamation, and therefore, the defendant's major misconduct report was an absolutely privileged communication for which liability could not attach. *Id.*

This Court agreed with the trial court, finding that a prison disciplinary hearing was a "judicial proceeding" and statements made in relation to such hearings were absolutely privileged. *Id.* at 293-294. This Court stated that strong policy reasons favored a finding of absolute privilege, *id.* at 297, and that allowing prisoners to bring defamation actions against corrections officers who were carrying out their obligations would have a chilling effect upon the reporting of offenses within a prison and would result in the court being inundated with prisoners' lawsuits. *Id.*

This Court explained the privilege:

> It is well settled in Michigan that statements made during the course of legislative proceedings, statements made during the course of judicial proceedings, and communications by military and naval officers are absolutely privileged. "Judicial proceedings" may include any hearing before a tribunal or

[2] At issue in this case are the statements made by defendants with regard to the acquitted charge of aggravated indecent exposure inasmuch as plaintiff was convicted of disturbing the peace.

> administrative board that performs a judicial function. An absolutely privileged communication is one for which no remedy is provided for damages in an [sic] defamation action because of the occasion on which the communication is made. A privileged occasion is an occasion where the public good requires that a person be freed from liability for the publication of a statement that would otherwise be defamatory. Public policy is the principle underlying the doctrine of absolute privilege. [*Couch, supra* at 294 (citations omitted).]

In the present case, plaintiff alleged that defendants lied in their statements by stating that they observed him expose himself. Like the filing of the "major misconduct report" in *Couch*, the statements regarding plaintiff's conduct were made as a complaint to the police. This Court has stated:

> The immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits. See *Stewart v Walton,* 254 Ga 81; 326 SE2d 738 (1985) (complaint); *Gunter v Reeves,* 198 Miss 31; 21 So 2d 468 (1945) (search warrant); *Jenson v Olson,* 121 Minn 388; 141 NW2d 488 (1966) (testimony at civil service hearings). The judicial proceedings privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Sanders v Leeson Air Conditioning Corp,* 362 Mich 692, 709; 108 NW2d 761 (1961). [*Couch, supra* at 295.]

In addition, like the policy concerns in *Couch,* there are strong policy reasons supporting a finding of absolute privilege in the case at hand. Allowing a person to bring a defamation action against the person(s) making a report of criminal activity would have a chilling effect on the reporting of such abuse and could result in numerous actions for defamation being filed in our lower courts.

With regard to privileges accorded to statements, in *Hall v Pizza Hut of American, Inc,* 153 Mich App 609, 619; 396 NW2d 809 (1986), this Court held that "information given to police officers regarding criminal activity is absolutely privileged." In *Hall,* the plaintiffs were arrested based on information supplied by Pizza Hut employee Nichols, who thought the plaintiffs looked like three people who had committed an armed robbery five days earlier at the restaurant. The plaintiffs were released and no charges were ever filed against them. *Id.* at 612. The plaintiffs filed a complaint against Pizza Hut and the City of Detroit, which included a claim for slander. *Id.* The trial court denied Pizza Hut's motion for summary disposition on the ground that there were "disputed questions of material fact regarding the reasonableness of the behavior of the Pizza Hut employees in this particular instance." *Id.* This Court found that the plaintiffs' claim of slander failed, in part because the information given to the police officers regarding criminal activity was absolutely privileged. *Id.* at 619, citing *Shinglemeyer v Wright,* 124 Mich 30, 239-240; 82 NW 887 (1990). Although the *Hall* Court may have retreated slightly from this statement, *Shinglemeyer* unequivocally states that statements made to police regarding criminal activity are absolutely privileged. The Supreme Court reiterated this finding in *Gowan v Smith,* 157 Mich 443, 450; 122 NW 286 (1909):

> The private citizen, as part of his moral duty to the public, should undoubtedly convey to the police officers any information he may have in regard

> to a crime believed to have been committed, and the perpetrator thereof. Such communications are absolutely privileged.

Couch and *Hall* remain good law. Thus, pursuant to Michigan law, communications made to police concerning criminal activity are absolutely privileged. Because all of the statements at issue were made to police concerning defendant's unlawful conduct, the trial court did not err by granting summary disposition in favor of defendants on plaintiff's defamation claims.

III

Plaintiff asserts that the trial court erred by granting summary disposition of plaintiff's malicious prosecution claim. We disagree.

In an action for malicious prosecution, the plaintiff has the burden of proving (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his action, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998).

"[I]n Michigan, the prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution." *Matthews, supra* at 384. In the instant case, plaintiff did not allege that the indecent exposure prosecution was initiated other than at the sole discretion of the prosecutor. Indeed, the complaint alleges that the sheriff's department submitted a warrant request to the prosecutor, and that the prosecutor's office thereafter issued a complaint charging Irish with aggravated indecent exposure. Plaintiff did not allege that there was any inducement or pressure or an infringement on the prosecuting attorney's authority in bringing or continuing the prosecution. Further, plaintiff's contentions that his prosecution for aggravated indecent exposure was motivated by defendants' false information and for improper and malicious reasons are just mere allegations that have no substance. The trial court did not err by granting summary disposition in favor of defendants on plaintiff's malicious prosecution claim.

IV

Plaintiff contends that the trial court erred by granting summary disposition of plaintiff's claim of intentional infliction of emotional distress. Again, we disagree. To sustain a claim of intentional infliction of emotional distress, a plaintiff must establish the following: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996), citing *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Johnson v Wayne Co*, 213 Mich App 143, 161; 540 NW2d 66 (1995). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush, supra* at 234.

Plaintiff based his claim of intentional infliction of emotional distress on defendants' reports of criminal activity to the police. In light of our conclusion that these reports were

absolutely privileged, we conclude that the trial court properly granted defendants' motion for summary disposition on plaintiff's claim of intentional infliction of emotional distress.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra